Supreme Court, U.S.
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No. _____

* * *

IN THE UNITED STATES SUPREME COURT

OCTOBER 1996 TERM

* * *

LATREESE TABB,

Petitioner

V.

DILLARD DEPARTMENT STORES, INC,

Respondent

* * *

ON APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

AMENDED

PETITION FOR WRIT OF CERTIORARI

* * *

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48 pp

QUESTIONS PRESENTED FOR REVIEW

POINT ONE: DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR JUDGEMENT (N.O.V.) ON THE EMPLOYMENT DISCRIMINATION CLAIM?

POINT TWO: DOES THE PROPRIETY OF THE COURT OF APPEALS' ACTION WITH RESPECT TO THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CAUSE OF ACTION DEPEND UPON THE WRONGFUL RESOLUTION OF THE DISCRIMINATION CLAIM?

POINT THREE: DID THE APPELLATE COURT ERR BY REVERSING THE TRIAL COURT'S RULING ON THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CLAIM?

POINT FOUR: DO THE RULINGS OF THE TRIAL COURT AND THE COURT OF APPEALS CONFLICT WITH A SUPREME COURT DECISION, CONFLICT

WITH DECISIONS OF OTHER COURTS OF APPEAL, OR ARE THEY ERRORS WHICH SO FAR DEPART FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONS SUCH A DEPARTURE BY THE TRIAL COURT, THAT IT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

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JURISDICTION OF THE COURT

The order sought to be reviewed is the Order on appeal to the Fifth Circuit entered on April 22, 1997. A Motion for Rehearing was denied on May 14, 1997. This Court has jurisdiction based on the appropriate jurisdiction of the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. Section 1251. Notice has been served on counsel of record for Respondent pursuant to Rule 29 (.3).

STATUTES AND AUTHORITIES

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

Current through P.L. 104-333, approved 11-12-96

s 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this

subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

This cause was filed in State Court, and removed to Federal Court by the Defendant via diversity jurisdiction. This case was tried to a jury, and on Nov. 27, 1995, the jury returned a verdict for Plaintiff on two causes of action, an employment discrimination action under Federal law and an intentional infliction of emotional distress action under Texas law. The trial Court, the Honorable Sam Sparks, then granted Defendant's Motion for Judgement as a Matter of Law, (carried forward by the Court from a Motion for Directed Verdict) on the employment discrimination claim, but left the state claim intact.

Defendant appealed to the Fifth Circuit. Plaintiff cross-appealed the employment discrimination part of the Judgement. After oral argument, the Fifth

Circuit affirmed the Trial Court's order regarding the employment discrimination claim, and reversed the Trial Court with respect to the state law claim, on April 22, 1997. Plaintiff timely requested a rehearing, which was denied on May 14, 1997.

ARGUMENT

POINT ONE: DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR JUDGEMENT (N.O.V.) ON THE EMPLOYMENT DISCRIMINATION CLAIM?

The trial Court, and the Appellate Court on review, used a standard of review which places an incorrect burden of proof on the Plaintiff. The correct standard on review is whether enough evidence exists for the fact finder to infer that race was a motivating factor in the challenged employment decision. 42 U.S.C.A. Section 2000e-2(m). It is not within the province of the reviewing court to disturb a jury finding supported by the record even if the reviewing court would have been inclined to rule differently had the matter been presented to it in the first instance. Polanco v. City of Austin, 78 F.3d

968 (5th Cir. 1996) Where a jury chooses between two clearly identifiable factual stories in a discrimination case, jury's verdict must be affirmed. Polanco.

Defendants are required to put forward reasons for the challenged practice or decision. TDCA v. Burdine, 450 U.S. 248 (1981), McDonnell Douglas v. Green, 411 U.S. 792 (1973) Juries are not required to believe these reasons. The mere fact that a defendant has stated a reason which, if believed, would excuse the challenged conduct, does not automatically entitle him to victory upon review.

In reviewing a jury verdict under Rule 54, a court does not act as an independent factfinder. A court may not set aside a jury verdict merely because it disagrees with the findings of the jury. Davenport v. DeRobertis, 844 F 2d 1310, cert.den. 109 S.Ct. 260. Instead, the

Court may only address the issue of the legal sufficiency of the evidence. The correct standard is that a motion for judgement N.O.V. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence. Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969) (en banc) In Re Lewis, 845 F. 2d 624, Brock v. Merril-Dow, 874 F.2d 307, mod. 884 F.2d 166, reh den 884 F.2d 167, reh. den. 886 F.2d 1314, cert. den. 110 S.Ct. 1511, Seeney v. Citgo, 848 F.2d 664. The Court must consider all the evidence, but it must be considered in the light most favorable to the verdict winner and with all reasonable inferences drawn for the prevailing party. Reveley v. Berg, 601 F. Supp.44, Medtronic v. Intermark, 799 F.2d 734, cert.den. 107 S.Ct. 816. Farpella-Crosby v. Horizon 97 F.3d 803 (5th Cir. 1996) In fact, it is error for

a district court to grant a motion J.N. O.V. if conflicting inferences can be drawn from the evidence. City Nat. Bank v. U.S., 907 F.2d 536. If there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair minded jurors, in exercise of impartial judgement, might reach different conclusions, then Judgement N.O.V. is improper. Zaklama v. Mt. Sinai, 842 F. 2d 291, Arenson . Southern University, 911 F.2d 1124 (5th Cir. 1990) The Court standard, when reviewing the findings, is whether the employee tendered factual evidence that could lead a jury to reasonably conclude that the reason was pretextual. Montgomery v. Brookshire, 880 F. Supp 483.

In this case, the trial Court found that the Plaintiff had produced substantial evidence that the proffered reasons

were not the true reasons. Then, the trial Court found, somewhat facetiously, that conflicting inferences might be drawn from the evidence presented. Then the Court used the "greater enterprise test" to rule that the Plaintiff had not met their burden of proof.

The "greater enterprise" standard, as stated by the Supreme Court, merely explains why Plaintiffs are not entitled to judgement as a matter of law when they offer convincing or even overwhelming proof that the proffered reasons for the challenged conduct are false. Hicks v. St. Mary's, 113 S.Ct. 2747 (1993). The jury, when not convinced that the proffered reasons are true, may infer that some other reason was the true reason for the challenged practice. They do not necessarily have to infer a violation of Title VII. However, the jury is allowed to

infer intentional discrimination where they disbelieve the reasons put forward by the defendant, particularly if disbelief is accompanied by a suspicion of mendacity. Hicks v. St. Mary's, 113 S.Ct. 2747 (1993).

The "greater enterprise test" was used by the trial court in this cause to not allow the inference of discrimination even after finding substantial proof that the proffered reasons were false. The trial court did not draw all reasonable inferences for the prevailing party as it is required to do, Reveley v. Berg, 601 F. Supp.44, Medtronic v. Intermark, 799 F.2d 734, cert.den. 107 S.Ct. 816, and it did grant a Judgement N.O.V. even after specifically holding that conflicting inferences might be drawn from the evidence, as it is not allowed to do. City Nat. Bank v. U.S., 907 F.2d 536. The "greater en-

terprise test", as used by the trial court, contradicts the Boeing v. Shipman instructions for review. The "greater enterprise test", as used by the trial Court, usurps the authority of the fact finder, imposes an unfair and unlawful burden of proof on the Plaintiff and is an error.

The St. Mary's opinion, and the Montgomery opinion, are a necessary and logical extension of Boeing v. Shipman, supra. If a jury is permitted to infer Fact B from Fact A, then Boeing holds that such inference must be respected and affirmed. The proper question for a sufficiency review on this point should then turn to the sufficiency of the evidence of Fact A.

The McDonnell Douglas framework for analysis and the St. Mary's case specifically allow a jury to infer discrimination if they do not believe the proffered rea-

sons for the challenged employment practice. (See also Walker v. Correctional, 886 F. Supp 515 W.D.Pa (1995)) Under Boeing, therefore, in any case in which the Plaintiff has produced substantial evidence that the proffered reasons are not the true reasons, a jury finding of discrimination should be upheld. In this case, the Trail Court found, and the Defendant did not contest on review, that the Plaintiff had produced substantial evidence that the proffered reasons were not the true reasons. Since that is the case, the jury finding, inferring a discriminatory intent from the substantial evidence, should be affirmed.

POINT TWO: DOES THE PROPRIETY OF THE COURT OF APPEALS' ACTION WITH RESPECT TO THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CAUSE OF ACTION DEPEND UPON THE WRONGFUL RESOLUTION OF THE DISCRIMINATION CLAIM?

If the trial Court was had ruled correctly on the discrimination claim, the Court of Appeals would have viewed the Defendant's appeal in a different light. Under Texas law, mere discharge from employment does not rise to "outrageous behavior". Wornick v. Casas, 856 S.W.2d 732 (Tex 1993). Under Texas law, if an actor does no more than insist on its legal rights, there is no liability for intentional infliction of mental distress. Reid v. Sears, 790 F.2d 453 (6th Cir. 1986). However, if it discriminated, the Defendant cannot claim that it did no more than insist on its legal rights in terminating Plaintiff, since there are specific

Federal laws against such actions.

Since evidence was presented that the proffered reason for the Plaintiff's termination was false, the jury was entitled to infer a racially discriminatory motive in the termination of Plaintiff. St. Mary's v. Hicks, supra. Had such a judgement remained intact before the Court of Appeals, it would not have reversed the trial Court's judgement for Plaintiff on the intentional infliction of mental distress issue. Therefore, a correct review of the intentional infliction of mental distress cause cannot occur before this Court rules on the discrimination cause.

POINT THREE: DID THE APPELLATE COURT ERR BY REVERSING THE TRIAL COURT'S RULING ON THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CLAIM?

The trial court properly denied the Defendant's Motion for Judgement and entered judgement against the Defendant on the issue of intentional infliction of emotional distress. With respect to "outrageous conduct", the Defendant was not entitled to judgement as a matter of law. Under Texas law, mere discharge from employment does not rise to "outrageous behavior". Wornick v. Casas, 856 S.W.2d 732 (Tex 1993). Under Texas law, if an actor does no more than insist on its legal rights, there is no liability for intentional infliction of mental distress. Reid v. Sears, 790 F.2d 453 (6th Cir. 1986).

This case is distinguishable from the

cited cases. First, none of the cited cases have anything to do with race discrimination. Since there are specific federal statutory restrictions against discharge for race reasons, if it discriminated, the Defendant cannot claim that it did no more than insist on its legal rights in terminating Plaintiff.

The jury found that the conduct in this case was outrageous. The trial court properly found that the jury finding was supported by factually sufficient evidence, and denied the Defendant's motion for judgement. As discussed above, if there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair minded jurors, in exercise of impartial judgement, might reach different conclusions, then Judgement N.O.V. is improper. Zaklama v. Mt. Sinai, 842 F. 2d 291. Therefore, if

from the facts presented, and from the inferences reasonably drawn from the facts, a rational trier of fact could have found for the Plaintiff, the trial court must uphold the verdict.

The evidence adduced at trial, together with the permissible inferences, were enough to convince reasonable and fair jurors in the exercise of impartial judgement, that the conduct was outrageous. Since evidence was presented that the proffered reason for the Plaintiff's termination was false, the jury was entitled to infer a racially discriminatory motive in the termination of Plaintiff. St. Mary's v. Hicks, supra. A reasonable juror could have concluded that a wrongful termination motivated by race was by itself outrageous.

There was additional evidence. Two warrant checks were conducted by Defen-

dant's employees on the Plaintiff. One loss prevention agent admitted that warrant checks are not normally available to employers. Defendant arranged for Plaintiff to be arrested in the store. Both loss prevention agents testified that the arrest could have been handled another way. Plaintiff was handcuffed, and taken into a small loss prevention office covered with pictures of minorities. Plaintiff was searched and her purse rifled by another loss prevention agent. Plaintiff was escorted from the store, in full view of other employees and customers, under armed and uniformed guard. The acts complained of occurred in a short time frame and were arranged or orchestrated by the store manager Robert Boyce and other employees. It was the purposeful timing of these events to occur one right after the other that produced great mental distress.

Even if it might be said that each separate act did not rise to the level of outrageousness required by the case law, the orchestration of such actions to produce maximum distress is outrageous. Furthermore, the jury found that the conduct was motivated by race discrimination. Under these facts, a rational juror could have concluded that such conduct was outrageous.

Since the issue of outrageousness was both properly presented to the jury and supported by facts sufficient to convince a rational juror, the trial court properly entered judgement against the Defendant. The Appellate Court, on review, acted as a fact finder and ignored the findings of the jury and the trial Court.

POINT FOUR: DO THE RULINGS OF THE TRIAL COURT AND THE COURT OF APPEALS CONFLICT WITH A SUPREME COURT DECISION, CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL, OR ARE THEY ERRORS WHICH SO FAR DEPART FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONS SUCH A DEPARTURE BY THE TRIAL COURT, THAT IT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

The decision of the trial Court, and the Court of Appeals, conflicts with decisions of this Court. In discrimination cases, defendants are required to put forward reasons for the challenged practice or decision. TDCA v. Burdine, 450 U.S. 248 (1981), McDonnell Douglas v. Green, 411 U.S. 792 (1973) Juries do not have to believe them. Juries are allowed to infer intentional discrimination where they disbelieve the reasons put forward by

the defendant, particularly if disbelief is accompanied by a suspicion of mendacity. Hicks v. St. Mary's, 113 S.Ct. 2747 (1993). The trial Court in this cause, and the Appellate Court on review, did not allow the jury to infer discrimination even though the trial Court specifically found that there was substantial evidence to support the jury's disbelief of the proffered reason.

Interpreting the Court's holding in Hicks v. St. Mary's, 113 S.Ct. 2747 (1993) has been difficult for the lower courts. There is substantial conflict between lower courts on this point, and also in age discrimination cases addressing the analogous point. Hairston v. Gainesville, 9 F.3d 913 (11th Cir. 1993); Maddow v. Proctor, 1997 WL 91128, No. 95-9576 (11th Cir. 3/19/97); Ingels v. Thiokol, 42 F.3d 616 (10th Cir. 1994); Rea v. Martin, 29

F.3d 1450 (10th Cir. 1994); Howard v. BP Oil, 32 F.3d 520 (11th Cir. 1994); Udo v. Tomes, 54 F.3d 9 (1st Cir. 1995); Isenbergh v. Knight-Ridder, 97 F.3d 436 (11th Cir. 1996); Sheridan v. Dupont, 100 F.3d 1061 (3rd Cir. 1996). The Correct standard, in compliance with Hicks v. St. Mary's, should be that if there is substantial evidence that the employer's proffered reasons are false, then a jury is permitted to infer discrimination. This Court should exercise its jurisdiction to address this conflict.

Furthermore, with respect to the correct standard of review, this decision conflicts with several other cases in the Courts of Appeal and the 5th Circuit itself. The correct standard is that a motion for judgement N.O.V. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn

from the evidence. Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969) (en banc) In Re Lewis, 845 F. 2d 624, Brock v. Merril-Dow, 874 F.2d 307, mod. 884 F.2d 166, reh den 884 F.2d 167, reh. den. 886 F.2d 1314, cert. den. 110 S.Ct. 1511, Seeney v. Citgo, 848 F.2d 664. The Court must consider all the evidence, but it must be considered in the light most favorable to the verdict winner and with all reasonable inferences drawn for the prevailing party. Reveley v. Berg, 601 F. Supp.44, Medtronic v. Intermark, 799 F.2d 734, cert.den. 107 S.Ct. 816. Farpella-Crosby v. Horizon 97 F.3d 803 (5th Cir. 1996) In fact, it is error for a district court to grant a motion J.N.O.V. if conflicting inferences can be drawn from the evidence. City Nat. Bank v. U.S., 907 F.2d 536. If there is substantial evidence, that is, evidence of such quality and weight that reasonable

and fair minded jurors, in exercise of impartial judgement, might reach different conclusions, then Judgement N.O.V. is improper. Zaklama v. Mt. Sinai, 842 F. 2d 291, Arenson v. Southern University, 911 F.2d 1124 (5th Cir. 1990), Walker v. Nationsbank, 53 F.3d 1548. Where a jury chooses between two clearly identifiable factual stories in a discrimination case, jury's verdict must be affirmed. Polanco v. City of Austin, 78 F.3d 968 (5th Cir. 1996).

In this case, the trial Court found that the Plaintiff had put on substantial evidence that the Defendant's proffered explanations were not true. The trial Court found that conflicting inferences could be drawn from the evidence. However, the trial Court did not consider all the evidence in the light most favorable to the verdict winner and with all reasonable

inferences drawn for the prevailing party. The trial Court did not permit the jury to choose one of the two clearly identifiable factual stories in this discrimination case. This conduct conflict with other cases among the Courts of Appeal, and is such an error which so far departs from the usual and accepted course of judicial proceedings, that it calls for an exercise of this Court's power of supervision.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari and hear this appeal on its merits, and other such relief to which she may be entitled.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LATREESE TABB, Plaintiff	§ § §	
V.	§ §	NO. A 95-CV-257 SS
DILLARD'S, INC., Defendant	§ §	

ORDER

BE IT REMEMBERED on this the _____ day of December 1995, the Court reviewed the file in the above-styled and numbered cause and particularly Plaintiff Latreese Tabb's Motion for Judgment Under Rule 58[#59], Defendant Dillard Department Store, Inc.'s (Dillard's) Renewed Motion for Judgment as a Matter of Law After Trial and, In the Alternative, Motion for New Trial [#58], and Plaintiff's response to Defendant's Motion for Judgment [#60].

This cause was heard by a jury on November 27 through 29, 1995, and the jury awarded damages to the Defendant in the amount of $5,850 on her claim of race discrimination, $4,500 on her claim of intentional infliction of emotional distress, and $5,000 on her claim for punitive damages. After trial, the Court indicated to the parties that it was inclined to enter judgment as a matter of law on the race discrimination claim and would entertain briefs addressing the issue. Both parties filed briefs addressing this issue as well as the sufficiency of the evidence on the intentional infliction of emotional distress claim. Having carefully reviewed the post-trial briefs and the evidence presented during trial, the Court concludes that the law requires entry of judgment as a matter of law in favor of the Defendant on the race discrimination

claim, The jury's verdict on intentional infliction of emotional distress and punitive damages stands.

Standard of Review

The Fifth Circuit articulated the modern standard of review of motions for judgment as a matter of law in 1969:

> On motions for directed verdict and for judgment notwithstanding the verdict[1], the Court should consider all of the evidence--not just that the evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded

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[1]These motions were subsumed under the modern Rule 50 of the Federal Rules of Civil Procedure and are both now properly referred to as "motions for judgment as a matter of law.."

> men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions ... should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Co. v., Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969); *accord Leatherwood v. Houston Post Co..*, 59 F.3d 533, 535 (5th Cir. 1995); *Tutor v., Ranger Ins. Co.*, 804 F.2d 1395, 1397 (5th Cir. 1986).

Race Discrimination

Although the Fifth Circuit standard leaves a gray area on the spectrum between the point at which granting the motion is

certainly proper--where the evidence is "strongly and overwhelmingly" in favor of the movant--and the point at which granting the motion is certainly improper--where there is "a conflict in substantial evidence"--the issue of whether to grant the Defendant's motion in this particular case is not gray at all. The Plaintiff failed to present evidence of race discrimination, and thus the Defendant's motion should be granted to the extent it seeks judgment as a matter of law in its favor on the Plaintiff's race discrimination claim.

In a Title VII case, a plaintiff raises a presumption of unlawful discrimination by presenting a *prima facie* case of discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981). The burden of production of evidence, but not of proof,

then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the action. *Id.* at 254-55, 101 S. Ct. at 1094-95. Meeting this burden rebuts the presumption that the defendant unlawfully discriminated and the presumption completely drops out of the case.

The Plaintiff now has the opportunity to demonstrate that the proffered reason for the employment action was not the true reason and that race was. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742,2747 (1993); *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 542 (5th Cir. 1994). The Supreme Court has made clear that simply persuading the jury that the reason given by the defendant for the action is not the true reason does not conclusively estab-

lish that the defendant discriminated on the basis of race. Rather, it "becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 2752. In other words, the burden of proof and persuasion on the ultimate fact of whether the employer took the action by reason of a prohibited factor, *e.g.*, race, remains at all times on the plaintiff. *Burdine*, 450 U.S. at 255-56, 101 S. Ct. at 1094-95; *Rhodes*, 39 F.3d at 542.

Here there was simply no evidence of race discrimination. The Defendant did meet its intermediate burden of production by stating a legitimate, nondiscriminatory reason for its termination of the Plaintiff--that Plaintiff failed to accurately complete her application and misrepresented her history in the employment interview

regarding her former employment with Foley's, coupled with the report received by Dillard's that the Plaintiff had recently been terminated by Foley's for suspicion of theft, was certainly a legitimate, nondiscriminatory reason for termination. And the Plaintiff did admit sufficient evidence to support a finding that the express reason given by Dillard's for the termination was not the real reason. However, the plaintiff failed in the "greater enterprise"--the enterprise of proving that the true reason for her termination, or even *a* reason, was race discrimination.

There evidence established that actions taken with regard to the PLAINTIFF were extraordinary. Immediately after her termination from Dillard's, an off-duty Travis County sheriff's deputy working as a Dillard's security officer arrested Ms.

Tabb in a public area of Dillard's for a nine-year-old misdemeanor warrant for theft by check between $20 and $200 and took her directly to jail. In the experience of the witnesses and to their knowledge, no other warrant check had ever been run on any employee by another Dillard's employee.[2] No other Dillard's employee had ever, immediately upon termination, been arrested by an off-duty deputy sheriff working as a Dillard's employee, much less for a nine-year-old warrant. Further, Juanita Alcocer of the Austin Human Rights Commission testified that of nineteen other Dillard's employees who filled out their applications in a similarly "improper" manner to the way Plaintiff

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[2]Granted, however, never before had an off-duty deputy sheriff working as a security guard at Dillard's ever received a tip that another Dillard's employee had recently been terminated by another retail employer for theft..

filled out hers, none were ever terminated. None of this, however, necessarily has anything to do with race. The testimony of Ms. Alcocer tends to prove that the reason for termination proffered by the Defendant is false, and the other evidence tends to support a case for intentional infliction of emotion distress, an entirely separate issue to be discussed momentarily. But it does not establish evidence from which an inference of racial discrimination may be made, Perhaps the Plaintiff had insulted the employees in question at a company party and they sought revenge; perhaps the Plaintiff was an extraordinary salesperson and her superiors felt their job security threatened; perhaps the Plaintiff's laugh irritated them. All are ridiculous and repugnant reason to terminate someone, yet legal in an at-will employment situation such as

this one. And the evidence supports these inferences just as much as they support and inference of race discrimination. IN other words, to infer from the evidence that the Defendant terminated the Plaintiff because she is black is just to make an arbitrary guess.

Indeed, some testimony presented by the Plaintiff might be construes as indicating that Dillard's treats white and black people differently. The weight of the evidence taken as a whole, however, is quite insufficient to support a finding that the Defendant terminated the Plaintiff because of her race; the only possible evidence of race discrimination either was irrelevant to Dillard's treatment of its employees, had nothing whatsoever to do with the people involved in this case, or both.

The weakest of such testimony estab-

lished that photos of persons previously arrested for criminal trespass, which were posted in the security office, were somewhere between 75% to virtually all minorities. Even assuming, for the sake of argument, that such a display indicates racial bias against minorities on the part of Dillard's, it simply has nothing to do with Dillard's attitudes toward its employees, much less its attitude toward the Plaintiff in particular.

And the same may be said of the allegedly discriminatory statements made by Robert Boyce, the supervisor who terminated the Plaintiff, in training sessions, Mr. Boyce testified that in training sessions he tells new employees that one no longer can discern thieves by outward appearance. the Plaintiff testified that she took this to mean that no longer are all thieves minorities. Whatever infer-

ence of racial bias this statement can support, if any, it, too, is irrelevant to the Defendant's treatment of its employees in general or the plaintiff in particular.

Rosalind Carr, a former employee at the same Dillard's store in which Plaintiff had worked, testified that she believed she had been terminated because she was black, rather than for falsifying a receipt as the Defendant had claimed. Ms. Carr's perception of what happened in her case bears very little on what happened in the plaintiff's case; even accepting Ms. Carr's conclusion as to her termination, to infer from that situation that Robert Boyce, the supervisor of the Plaintiff but never of Ms., Carr, decided to terminate the Plaintiff because she is black would require a mental leap that even the intellectual Rigbys, Comenicis, and Korbuts of the work could not perform.

Finally, the plaintiff's own testimony that she believed she was terminated because of her race is insufficient to support an inference of racial discrimination. People are not entitled to recover judgments simply because they honestly *believe* they have been wronged; they must prove it. Truly, often it is difficult to muster up enough evidence of an actual wrongdoing to prove it occurred, especially when a state if mind is at issue. The law has evolved dramatically to take account of such difficulties, often allowing for reasonable inferences to be drawn from circumstantial evidence when no"smoking gun" can be found. Here, for example, a jury could infer racial discrimination from a pattern or practice of discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36, 97 S. Ct. 1843, 1854-55 (1977). But the Plaintiff

did not establish any such pattern or practice. To prove her claim by establishing a pattern or practice of discrimination, the Plaintiff would need to show that racial discrimination was the Defendant's "standard operating procedure--the regular rather that the unusual practice." *Id.* the Plaintiff's subjective belief, Ms. Carr's subjective belief, the photos on the wall, the training instructions given by Mr. Boyce--all are slim reed, even when amasses, upon which to infer race discrimination and furthermore are, at best, anecdotal instances of racial bias or discrimination. The "mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" is not enough to show a pattern or practice of discrimination. *Id.* at 336, 97 S. Ct. at 1855.

Whether the Defendant fired the Plaintiff because she is black can never

be known with absolute certainty. One thing is certain, however--given the utter lack of evidence on the issue, to find that it did is to simply guess. The Plaintiff did not proffer any statistical or other compelling evidence from which a reasonable jury could find or infer racial discrimination in her case. Rather, she offered only a few subjective personal perceptions and some weak circumstantial evidence of discrimination in unrelated areas of the Defendant's business. There is no conflict in substantial evidence regarding the race discrimination claim, and therefore the Court must lay the jury's verdict on this issue aside and render judgment for the Defendant.

Intentional Infliction of Emotional Distress

The intentional infliction of emo-

tional distress claim is an entirely different matter, however. A reasonable jury could very well find that the Defendants' employees' actions accompanying the Plaintiff's termination were extreme and outrageous and caused her severe emotional distress. A recitation of the evidence bears this out. Robert Boyce, the supervisor who terminated the Plaintiff, when informed of the warrant out for Plaintiff's arrest on November 22, 1993, never requested that the deputy sheriffs execute the arrest warrant. In fact, Boyce, according to his testimony, asked whether the deputy sheriffs could wait until the Plaintiff left the premises before they executed the warrant. However, when they told him they could not wait, that they must execute the warrant immediately when they saw the plaintiff in the store, Mr. Boyce prearranges with deputy LeBlanc to

be waiting outside of Boyce's office for the Plaintiff after the termination meeting.

ON November 23, 1993, the Plaintiff, upon her arrival at work, was brought into Boyce's office and terminated from her employment on the spot without opportunity to respond to any reason for the action., While walking out of Boyce's office, accompanies by her direct supervisor who was unaware of the impending arrest, Ms. Tabb was immediately approached by deputy Alred LeBlanc, a uniformed Travis County deputy sheriff working as security personnel for Dillard's, and was arrested on the spot. After being taken to the security office, wherein she was temporarily handcuffed upon becoming extremely upset, she was led through the public areas and then out of the store by LeBlanc and another unidentified woman. Outside she was placed in the

back seat of an unmarked government automobile, inside a visible metal "cage" used in such vehicles to protect the passengers in the front seat, and driven directly to the county jail.

The Defendant may well have had good reason to fire the Plaintiff. And it may well be that the warrant was, despite being for a nine-year-old misdemeanor, valid and active. But for the Defendant's employees to orchestrate events such that immediately after one of Dillard's employees fired Ms. Tabb, another would approach and arrest her in a public area of the store and send her straight to jail could certainly be considered extreme and outrageous by a reasonable fact finder under the circumstances of this case. The Defendants put Officer LeBlanc on the stand who testified, without objections, that the Texas Code of Criminal Procedure *re-*

quires peace officers to immediately execute warrants upon their confirmation. While the Travis County Sheriff's Department may have its own such policy, the Texas Code of Criminal Procedure contains no such requirement.[3] If the Defendant chooses to employ off-duty Travis County deputy sheriffs to staff its loss prevention department, and chooses to delegate to them discretion over the manner in which to conduct loss prevention,[4] it must take responsibility for the actions of

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[3]Even if the Travis County Sheriff's Department had a policy of immediate arrest, the Court has trouble swallowing the argument that the deputies acted pursuant to that policy. Rather than acting on the information when they received it on November 22, by example by attempting to contact the Plaintiff at her home, they deliberately waited until the following day when the plaintiff came into work to apprehend her.

[4]Robert Boyce testified that while the deputies employed by Dillard's attend the general training session that all employees attend, Mr. Boyce does not give any special training regarding loss prevention to the deputies.

those employees undertaken while working on the clock of the Defendant.

The Defendant disputes this legal conclusion, citing two published Texas cases and one unpublished Fifth Circuit decision in support of its argument that the off-duty deputies acted solely in their capacities as Travis County sheriff's deputies and Dillard's is not responsible for those actions. The Defendant requests the Court to set aside the jury's verdict for the Plaintiff on this issue or, in the alternative, to order a new trial on the ground that the jury charge incorrectly explained the law. The cases are inapposite, however; they merely describe an off-duty deputy's duties in exigent circumstances. The Texas cases note that off-duty deputies have a duty to act when, in their presence or view, injury to person or property by another is

imminent. *see City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W. 2d 374, 377 (Tex. App. --Dallas 1994); *Vernon v. City of Dallas*, 638 S.W. 2d 5, 8-9 (Tex. App.--Dallas 1982, writ ref'd n.r.e.); *see also* TEX. CODE CRIM. PROC. ANN. arts. 6.05, 6.06 (Vernon 1981 & Supp. 1996). If the deputy happens to be working in the private employ of another at the time, he "ceases to be an employee or independent contractor" when the duty to immediately act arises. *Half Price Books, Records, Magazines, Inc.*, 883 S.W .2d at 377. Similarly, in holding that a private employer was not responsible for the actions of its security personnel, the Fifth Circuit was reviewing a situation in which an off-duty deputy was alerted to and observed criminal activity occurring on the premises. *See Moore v. Wal-mart stores, Inc.*, No. 94-20379 (5th Cir. June

30, 1995).

Here, no such exigent circumstance existed. The Dillard's deputies were not observing criminal activity occurring when they took the action they did. Indeed, the alleged criminal activity had occurred nine years earlier according to the information on the face of the warrant. No exigent circumstances presented themselves, as evidenced by the failure of the deputies to act immediately--they deliberately waited after receiving the information about the warrant to arrest Ms. Tabb until she was fired at the store. Moreover, both deputies admitted that the arrest warrant could have been executed in a variety of ways. For example, when the deputies learned on November 22 of the warrant, they could have telephoned Ms. Tab when they learned she was at home with her sick children. They could have tele-

phoned her anytime the next day up until 5:15 p.m., the time she reported for work at Dillard's. They could have informed an on-duty officer not working for Dillard's of the warrant to carry out its execution, Instead, the deputies deliberately chose, in spite of the availability of several less severe options, to arrest Ms. Tabb in a public space while working off-duty in the capacity of security guards for Dillard's. Dillard's cannot avoid the fact that all of the actions taken with regard to Ms. Tabb--the receipt of the phone call from Dillard's, the "involvement check," the warrant confirmation, the decision to arrest, and the arrest itself--were initiated and carried out by its own employees while working on the clock. Put simply, a deputy sheriff's badge is not a blank check absolving an employer of all discretion and responsibility for the actions of

its employee carrying the badge. When, as here, a deputy is off-duty and working for a private employer, and no particular duty to prevent criminal conduct has arisen, the employer cannot escape liability by hiding in the shadow of the deputy's badge.[5]

In conclusion, there was more than sufficient evidence presented for a reasonable jury to find by a preponderance of the evidence that the Defendant intentionally and deliberately caused Ms. Tabb to suffer severe emotional distress, and therefore the Court will not set aside the factual determinations of the jury.

Accordingly, the Court enters the following order:

[5]The Defendant does not dispute in its motion that the evidence presented was sufficient to support a determination that the incident caused Ms. Tabb to suffer severe emotional distress, and the Court concludes that the evidence was indeed sufficient.

IT IS ORDERED that Defendant's Renewed Motion for Judgment as a Matter of Law After Trial and, In the Alternative, Motion for New Trial [#58] is GRANTED IN PART and DENIED IN PART, and a take nothing judgment will be entered on Plaintiff's race discrimination claim.

IT IS FURTHER ORDERED that Plaintiff's Motion for Judgment Under Rule 58[#59] is GRANTED IN PART and DENIED IN PART, and judgment will be entered pursuant to the jury verdict on the intentional infliction of emotional distress and punitive damages claims.

SIGNED on this _____ day of December 1995.

Sam Sparks
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LATREESE TABB,	§	
Plaintiff	§	—
	§	
V.	§	NO. A 95-CV-257 SS
	§	
DILLARD'S INC.,	§	
Defendant	§	

JUDGMENT

BE IT REMEMBERED on the 27th day of November 1995, the Court called the above-styled and numbered cause for jury selection and trial. The trial concluded on November 29 and the Court submitted the case to the jury. The jury returned a verdict as follows:

Question One:	Yes
Question Two:	A: $5,850; B: $0; C: $0; D: $0
Question Three:	Yes
Question Four:	A: $4,500; B: $0
Question Five:	$5,000.00

Defendant Dillard Department Stores, Inc. moved for judgment as a matter of law after the presentation of the Plaintiff's case, renewed the motion at the conclusion of all the evidence, and filed a motion notwithstanding the verdict. Plaintiff filed a motion for entry of judgment on the jury's verdict. For the reasons detailed in the Court's memorandum order, the Court now enters the following judgment:

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff Latreese Tabb shall TAKE NOTHING by her cause of action against Dillard Department Stores, Inc. for race discrimination under Title VII of the Civil Rights Act and the Texas Commission on Human Rights Act.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Latreese Tabb have and recover judgment against Defendant

Dillard Department Stores, Inc. for the total sum of $9,500.00 plus prejudgment interest at a rate of 10% per annum calculated between November 23, 1993 and November 29, 1995, and postjudgment interest at a rate of 5.4% per annum until the judgment is finally and fully paid for which let execution issue.

SIGNED on this _____ day of December, 1995.

Sam Sparks
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50049

D.C. Docket No. A-95-CV-257

LATREESE TABB
Plaintiff - Appellee-Cross-Appellant

V.

DILLARD, INC.
Defendant - Appellant-Cross-Appellee

Appeals from the United States District Court for the
Western District of Texas, Austin

Before REYNALDO G. GARZA, HIGGINBOTHAM, and JONES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this Cause is affirmed in part and reversed in part.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: May 22, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-50049

LATREESE TABB,
Plaintiff-Appellee-Cross Appellant,

versus

DILLARD, INC.,
Defendant-Appellant-Cross-Appellee

Appeal from the United States District Court
For the Western District of Texas

(A-95-CV-257)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:******

The judgment entered on the jury's

******Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

finding of intentional infliction of emotional distress is reversed. The district judge erred in denying defendant motion for a directed verdict and judgment J.N.O.V. on this claim. The evidence does not meet the standard for outrageous conduct under Texas Law. The judgment is otherwise affirmed in all respects.

AFFIRMED in part; REVERSED in part.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-50049

LATREESE TABB
Plaintiff - Appellee-Cross-Appellant

V.

DILLARD, INC.
Defendant - Appellant-Cross-Appellee

Appeal from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, HIGGINBOTHAM and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

Edith Jones
United States Circuit Judge